

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON JON CARROLL,

Defendant-Appellant.

UNPUBLISHED

August 7, 2007

No. 270544

Allegan Circuit Court

LC No. 05-014407-FH

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

MEMORANDUM.

Defendant appeals as of right his jury trial conviction of fourth-degree fleeing and eluding a police officer, MCL 257.602a(2), for which he was sentenced to 36 months of probation, with 150 days in jail. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that the prosecution improperly questioned him regarding the credibility of prosecution witnesses. He did not object to the prosecutor's questioning, and therefore his claim that it was improper is not preserved for appellate review. Unpreserved claims of prosecutorial misconduct are reviewed under the plain error test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses; his opinion is not probative of the matter. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Credibility determinations are to be made by the finder of fact. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). The potential prejudice of the questioning is that it forced defendant to acknowledge the direct conflict between his accounts and the accounts of state troopers. However, the conflict was already apparent; the contradictions between defendant's account and that of the troopers were evident during defendant's direct examination. The prosecution's questioning resulted in defendant's explicit characterization of portions of their accounts as fabrications, but inasmuch as the implication that they were lying was already present, there is no reason to believe that the questioning was prejudicial, i.e., that it affected the outcome of the trial. Therefore, defendant has not met the "plain error" requirements for relief under *Carines*.

Defendant also claims that counsel was ineffective for failing to object to the misconduct and request a curative instruction. To establish ineffective assistance of counsel, a defendant

must show “that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citations and internal quotation marks omitted). He must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000) (citation and internal quotation marks omitted).

Even if the failure to object were deemed to be a serious error, there is no reasonable probability that had counsel objected and obtained a curative instruction, the result of the proceeding would have been different. Accordingly, defendant is not entitled to relief on his claim based on purported ineffective assistance of counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly